

### **REMARKS**

Claims 1-24 remain pending in the application. The Examiner is respectfully requested to reconsider and withdraw the rejection in view of the remarks contained herein.

### **REOPENING OF PROSECUTION**

In his Response to Arguments set forth in the Office Action of October 9, 2008, the Examiner states that Applicants' Appeal Brief arguments "had been fully considered and are persuasive". The Examiner then alleges that he has "withdrawn" the rejection and entered a new grounds therefor. With all due respect, the Examiner had no rejection to withdraw, as he had been fully reversed by the Board of Patent Appeals and Interferences in its decision of September 18, 2008.

By commissioning a new search after receiving the Board's decision of reversal, the Examiner (and his co-signing supervisory colleagues) ignores the clear language of MPEP Section 1214.04, to wit:

The Examiner should never regard such a reversal as a challenge to make a new search to uncover other and better references.

In any event, what has been uncovered and now cited against the claims is not "better"—it is less pertinent than the previously applied art, as will be demonstrated below.

### **REJECTION UNDER 35 U.S.C. § 103**

Claims 1-24 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Olczok et al. (U.S. 5,821,474) in view of Itoyama et al. (U.S. 6,155,954). The rejection is respectfully traversed.

In the first place, Olczok et al. does not disclose a "passive" valve required by all of Applicants' claims. The Olczok et al. valve is semi-active, in that its actuation is dependent on sensed pressure relative to the atmosphere to yield a variable damping characteristic. By definition, this is not a passive valve.

In the second place, even if Olzok et al. did teach a passive valve (which it does not), the reference to Itoyama et al. is totally devoid of any disclosure or description of an exhaust system for the Itoyama et al. hybrid vehicle, let alone the positioning of a passive valve in such an exhaust system.

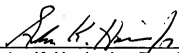
Hence, the cited combination fails to disclose every limitation of Applicants' claims and therefore does not rise to a *prima facie* case of unpatentability. Claims 1-24 are believed to be in condition for allowance.

#### CONCLUSION

It is believed that all of the stated grounds of rejection have been properly traversed, accommodated, or rendered moot. Applicant therefore respectfully requests that the Examiner reconsider and withdraw all presently outstanding rejections. It is believed that a full and complete response has been made to the outstanding Office Action and the present application is in condition for allowance. Thus, prompt and favorable consideration of this amendment is respectfully requested. If the Examiner believes that personal communication will expedite prosecution of this application, the Examiner is invited to telephone the undersigned at (248) 641-1600.

Respectfully submitted,

Dated: January 8, 2009

By:   
Gordon K. Harris, Jr. - Reg. No. 28615

HARNESS, DICKEY & PIERCE, P.L.C.  
P.O. Box 828  
Bloomfield Hills, Michigan 48303  
(248) 641-1600

GKH/al